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July 25, 2007

DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: February 26, 2008

Case Number: TSO-0606

This Decision concerns the eligibility of XXXXXXXXXXXX (hereinafter "the Individual") for access authorization (also referred to as a security clearance). The governing regulations are set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the Individual should be granted access authorization. For the reasons detailed below, I have concluded that the Individual should not be granted access authorization.

I. Background

In 2007, the Individual began employment with a DOE contractor and completed a Questionnaire for National Security Positions (QNSP). DOE Ex. 8 at 11-12. On the portion of the QNSP that asks the Individual to identify alcohol-related charges or convictions, the Individual reported a 1997 conviction for Driving Under the Influence of Alcohol (DUI). *Id.* at 27. On the portion of the QNSP that asks for other offenses, the Individual reported a 2001 conviction for reckless driving. *Id.* at 28.

The local security office (LSO) conducted a personnel security interview (PSI) of the Individual. DOE Ex. 9. During the PSI, the Individual discussed his past and current alcohol consumption. When asked when he had last been intoxicated, he stated that "[i]t could have been last weekend," reporting that he "might have" had 12 beers over two days. *Id.* at 21. The

Individual discussed the 1997 and 2001 offenses, including the fact that the 2001 reckless driving conviction was associated with a DUI arrest. *Id.* at 44-46. The Individual reported that, in conjunction with the 2001 DUI arrest, he paid a fine and attended 18 months of alcohol school and Alcoholics Anonymous (AA), and his license was suspended for two years. *Id.* at 48-57. When asked about records showing traffic violations in the 1980s, the Individual indicated that the 1984 and 1985 violations were DUIs. *Id.* at 66-71. After the PSI, the LSO referred the Individual to a DOE consulting psychiatrist (the DOE Psychiatrist or the Psychiatrist).

The DOE Psychiatrist evaluated the Individual in October 2007 and issued a report. DOE Ex. 5. The DOE Psychiatrist diagnosed the Individual as suffering from "Alcohol-Related Disorder, Not Otherwise Specified." DOE Ex. 5 at 6, 8, *citing* American Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders (4<sup>th</sup> ed. text rev. 2000) (DSM-IV TR).

The DOE Psychiatrist discussed the Individual's history of alcohol consumption, referring to portions of the PSI, as well as the Individual's statements during the psychiatric evaluation. DOE Ex. 5 at 2-4. After the 2001 DUI arrest, the Individual abstained from alcohol consumption for 18 months. *Id.* at 3. The Individual then resumed alcohol consumption and drank about twice a month - six beers and (infrequently twelve beers) on the weekend. *Id.* For a number of years, the Individual has abstained from alcohol consumption for the first five calendar months of the year. *Id.* When asked about his alcohol consumption the week before the psychiatric evaluation, the Individual reported consuming about seven beers on each of three separate days. *Id.* at 4. The DOE Psychiatrist characterized drinking five or more drinks on a single occasion as "binge" drinking. *Id.* at 4, 6. As for drinking and driving, the Individual reported that he continued to drive after consuming alcohol but that he did not drive after consuming more than two drinks. *Id.* at 6.

The DOE Psychiatrist ordered laboratory tests, and these tests showed an elevated level of gamma-glutamyltransferase (GGT), an enzyme associated with excess alcohol consumption. DOE Ex. 5 at 8, *citing* DSM-IV TR at 218. The elevated GGT level "suggested, but did not prove," that the Individual's consumption of alcohol was high enough to cause liver damage. DOE Ex. 5 at 6. In any event, the elevated GGT level represented mild liver dysfunction, which was of "particular

concern" given the Individual's family history of alcoholic cirrhosis in two uncles. *Id.* at 8.

Finally, the DOE Psychiatrist opined that the Individual had not presented adequate evidence of reformation or rehabilitation. The DOE Psychiatrist opined that such evidence would consist of one year of abstinence, accompanied by a treatment regimen such as individual alcohol abuse counseling or participation in AA. DOE Ex. 5 at 8.

In early 2008, the LSO notified the Individual of two security concerns. DOE Ex. 1 (Notification Letter, Attachment). One concern was the DOE Psychiatrist's diagnosis of an alcohol-related disorder. *Id.* at 1-2, *citing* 10 C.F.R. § 708.8(j) (Criterion J). The other concern was the Individual's failure to disclose his 1984 and 1985 arrests on his QNSP. DOE Ex. 1 at 1, *citing* 10 C.F.R. § 708.8(f) (Criterion F).

The Individual requested a hearing, DOE Ex. 2, and I was appointed to serve as the Hearing Officer. Prior to the hearing, the Individual submitted four documents, each of which is labeled as an exhibit. The first document is a 2002 court order that dismissed the 2001 DUI charge. Ind. Ex. 1. The second document is an April 2000 letter that discussed a psychiatric evaluation of the Individual by a psychiatric clinical nurse practitioner (the CNP). Ind. Ex. 2. The third document is the CNP's curriculum vitae. Ind. Ex. 3. The fourth document is an April 2008 laboratory report, showing a normal GGT level. Ind. Ex. 4.

In his evaluation, the CNP stated that the Individual "demonstrates insight into the effects of alcohol on him" and "now only drinks 2-3 times per year." Ind. Ex. 2 at 1. As for the Individual's history, the CNP agreed with the DOE Psychiatrist's diagnosis of "Alcohol-Related Disorder, Not Otherwise Specified," and he added a diagnosis of "Alcohol Abuse, in full remission." *Id.* at 2. The CNP stated that the Individual continues to drink "on occasion," but that this consumption does not interfere with his functioning in the workplace. *Id.*

At the hearing, the DOE Counsel presented one witness: the DOE Psychiatrist. The Individual testified and presented six witnesses, all of whom are family members who know him well.



drinks. *Id.* at 110. The Individual abstains from alcohol after December of each year for a certain number of months and has done so this year. *Id.* at 82-83, 109. The Individual's father testified that the Individual intends to resume drinking, but to cut down. *Id.* at 91.

D. The Individual's Daughters and Son-In-Law

An adult daughter has been living with the Individual for about four months and sees him every day. Tr. at 115-16. Prior to that, she was living in a separate city and saw the Individual only on special occasions. *Id.* at 120. The daughter testified that the Individual is not currently consuming alcohol; the last time she saw him consume alcohol was before the beginning of the calendar year. *Id.* at 116-17. She further testified that the Individual abstains from alcohol from the beginning of each year until Memorial Day, *id.* at 117-18, and that he does not have an alcohol problem, *id.* at 122.

Another adult daughter and her husband live in the same city as the Individual and see him more than once a week. Tr. at 27, 57-58. They have not seen the Individual consume alcohol since before the beginning of the calendar year and are aware of his pattern of abstinence during the first five months of the year. *Id.* at 28-29, 59, 70. They have not seen the Individual drink after work; when they have seen the Individual drink, it has been a holiday, special occasion, or camping trip. *Id.* at 29-31, 61-63, 68. The Individual does not have an alcohol problem. *Id.* at 26-27, 71.

The son-in-law testified concerning the Individual's understanding of the questions on the QNSP. The son-in-law testified that he helped the Individual complete the QNSP and that the Individual was confused about whether to go back seven or ten years and asked his manager about it. Tr. at 33-34.

E. The DOE Psychiatrist

The DOE Psychiatrist was present throughout the hearing. He testified last.

The DOE Psychiatrist discussed his evaluation and report. The DOE Psychiatrist viewed the DUIs as evidence of a functional problem related to alcohol consumption. Tr. at 191. The third and fourth arrests occurred when the Individual was in his forties and, therefore, cannot be attributed to youth and immaturity. *Id.* The Individual's driving after consuming

alcohol is a concern, because a person with a binge-drinking history is at risk of drinking more than intended and then driving. *Id.* at 191-92. The Individual's elevated GGT level was "well above normal" and showed there was "most likely" alcohol-related early damage being done to his liver. *Id.* at 198.

The DOE Psychiatrist addressed what he had heard at the hearing. As to the Individual's testimony that his alcohol consumption while on vacation, holidays, and special occasions is not representative, the DOE Psychiatrist testified that "that's going to keep coming up year after year" and represents a "special risk." Tr. at 195-96. As to the Individual's reliance on his April 2008 normal GGT level, the DOE Psychiatrist testified that the normal result was consistent with the Individual's cessation of alcohol consumption during the spring. In this respect, the DOE Psychiatrist noted that the Individual's other liver enzyme levels, while within the normal range in October 2007, were lower in April 2008, further indicating that the October 2007 elevated GGT level was related to excessive drinking. *Id.* at 201-02.

After considering the testimony at the hearing, the DOE Psychiatrist continued to opine that the Individual suffered from an alcohol-related disorder and needed a year of abstinence and treatment to establish reformation and rehabilitation. Tr. at 215-19.

### III. Applicable Regulations

The regulations governing an individual's eligibility for access authorization are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." An individual is eligible for access authorization if such authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). "Any doubt as to an individual's access authorization eligibility shall be resolved in favor of the national security." *Id.* See generally *Dep't of the Navy v. Egan*, 484 U.S. 518, 531 (1988) (the "clearly consistent with the interests of national security" test indicates that "security-clearance determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9<sup>th</sup> Cir. 1990) (strong presumption against the issuance of a security clearance).

If a question concerning an individual's eligibility for a clearance cannot be resolved, the matter is referred to administrative review. 10 C.F.R. § 710.9. The individual has the option of obtaining a decision by the manager at the site based on the existing information or appearing before a Hearing Officer. *Id.* § 710.21(b)(3). At a hearing, the burden is on the individual to present testimony or evidence to demonstrate eligibility for access authorization, *i.e.*, that access authorization "will not endanger the common defense and security and will be clearly consistent with the national interest." *Id.* § 710.27(a).

#### IV. Analysis

##### A. Criterion J Concern

The DOE Psychiatrist's diagnosis of an alcohol-related disorder raises a Criterion J concern. The Criterion J regulation specifically refers to whether an individual has been diagnosed as "alcohol dependent" or "suffering from "alcohol abuse" or has been or is a "user of alcohol habitually to excess." 10 C.F.R. § 710.8(j). We have held that this language encompasses a diagnosis of "Alcohol-Related Disorder Not Otherwise Specified." *See, e.g., Personnel Security Hearing, TSO-0524, 29 DOE ¶ 83,098 (2007).*

The Individual challenges the diagnosis of an alcohol-related disorder. He does not believe that he has an alcohol-related problem and testified as to the basis for that belief.

As discussed above, the DOE Psychiatrist addressed the Individual's specific challenges to the diagnosis. The DOE Psychiatrist accepted the Individual's testimony that his drinking the week before the psychiatric interview was not representative, but viewed the Individual's drinking on vacation and other special occasions as something "that's going to keep coming up year after year" and represents a "special risk." *Tr.* at 195-96. The DOE Psychiatrist testified that the Individual's practice of driving after a limited amount of alcohol was a "high-risk proposition" for the Individual because alcohol consumption impairs judgment and, therefore, can result in driving after consuming more than originally intended. *Id.* at 191-91. The DOE Psychiatrist cited the four DUI arrests as evidence of such impaired judgment. The DOE Psychiatrist further testified that the drop in the Individual's GGT level from October 2007 to April 2008 was most likely attributable to the Individual's cessation of alcohol consumption. *Id.* at 201-

02. The DOE Psychiatrist also noted that the April 2008 test showed lower levels of other liver enzymes, also consistent with the Individual's cessation of alcohol consumption. *Id.* Accordingly, the DOE Psychiatrist testified, the Individual's testimony concerning his alcohol consumption and his April 2008 normal GGT level did not change the diagnosis.

The CNP opinion does not provide a basis for rejecting the diagnosis. In fact, the CNP agreed with the diagnosis of "Alcohol-Related Disorder, Not Otherwise Specified," and he added a diagnosis of "Alcohol Abuse in full remission." Ind. Ex. 2 at 2. Accordingly, based on the undisputed expert evidence, I find that the Individual was correctly diagnosed with an alcohol-related disorder.

The experts do disagree, however, on whether the Individual has demonstrated adequate evidence of reformation and rehabilitation. See 10 C.F.R. § 710.7(c). The DOE Psychiatrist testified that the Individual's four months of abstinence was not adequate, and he testified that adequate evidence would consist of one year of abstinence and counseling. The CNP did not use the term "reformation and rehabilitation," but the gist of his report was that the Individual does not currently have an alcohol-related disorder.

I give greater weight to the DOE Psychiatrist's opinion. Unlike the DOE Psychiatrist, the CNP did not discuss the Individual's alcohol consumption during the past year. For example, the CNP report does not discuss the Individual's drinking the week before he saw the DOE Psychiatrist or the Individual's elevated GGT level at the time. The CNP did state that the Individual "now" drinks only two or three times a year. Ind. Ex. 1 at 1. When asked about that statement - which is clearly discrepant with the record - the Individual testified that the statement refers to his future intentions, not his consumption over the prior year. Tr. at 173-74. As to the CNP's statement that the Individual's drinking does not impair his workplace functioning, I note that the lack of such impairment does not preclude the existence of functional impairment in other settings and, therefore, is not adequate evidence of reformation or rehabilitation. See, e.g., *Personnel Security Review, Case No. VSA-0005*, 25 DOE ¶ 85,013 (1995) (excellent work performance insufficient to mitigate concerns about judgment and reliability arising from alcohol misuse). Based on the foregoing, I find that the Individual has not demonstrated adequate evidence of reformation and rehabilitation.



B. Criterion F Concern

The Notification Letter cites the Individual's failure to disclose his 1984 and 1985 arrests on his QNSP. Question 23 of the QNSP - "Your Police Record" - provides in relevant part:

- d. Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?

Yes: { } No: { }

. . .

- f. In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s) not listed in response to . . . d . . . above?

Yes: { } No: { }

If you answered "Yes" to . . . d . . . or f above, provide an entry for each occurrence to report.

An addendum to the QNSP specified that answers to Section 23(f) should go back 10 years, rather than 7 years. DOE Ex. 8 at 27.

The Individual responded "yes" to Section 23(d), reporting the June 1997 DUI conviction, and "yes" to Section 23(f), reporting the 2001 reckless driving conviction. *Id.* at 27-28. The Individual testified that he did not disclose the 1984 and 1985 arrests because he believed that he only had to disclose offenses seven or ten years in the past.

The plain language of Section 23(d) requires an individual to report *all* alcohol-related arrests. As just indicated, Section 23(d) asks if an individual has "ever" been "*charged with*" or "*convicted of*" any offense(s) related to alcohol or drugs. DOE Ex. 8 at 27 (emphasis added). The words "ever" and "charged with" clearly encompass all alcohol-related arrests, regardless of when they occurred and regardless of the ultimate disposition. The issue of whether one has to report matters seven or ten years in the past is an issue related to Section 23(f), not Section 23(d).

Given the plain language of Section 23(d), I doubt that the Individual was advised that Section 23(d) had a time limitation. An alternate explanation is that the Individual omitted the earlier arrests because he was trying to minimize his past problems with alcohol. The manner in which he reported his 2001 reckless driving conviction supports that explanation. Although

the 2001 conviction arose from a DUI arrest and resulted in 18 months of alcohol school and AA, DOE Ex. 9 at 48-57, the Individual did not report that arrest in response to Section 23(d) or otherwise identify it as alcohol-related. While the Notification Letter did not raise this omission as a security concern, it is appropriate for me to consider it when assessing the Individual's assertion that he was not trying to hide the extent of his alcohol-related offenses. Accordingly, based on the entire record, I find that the Individual has not resolved the concern that he "deliberately" omitted information from his QNSP.

#### V. Conclusion

The Notification Letter's Criteria F and J concerns have not been resolved. Because the concerns have not been resolved, I cannot conclude that granting access authorization to the Individual "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). Based on the foregoing, the Individual should not be granted access authorization. Any party may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. § 710.28.

Janet N. Freimuth  
Hearing Officer  
Office of Hearings and Appeals

Date: July 25, 2008